COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM 35 CENTS PER NUMBER

NOVEMBER, NINETEEN HUNDRED AND TEN.

NOTES.

RIGHT TO SOLICIT CUSTOMERS OF THE OLD FIRM AS AFFECTED BY A SALE OF THE GOOD WILL.—The legal concept of the goodwill of a business as a determinate property right is of comparatively recent development. It is now, however, generally regarded as fundamental that the advantages springing from the connection, relation, or "beaten pathway"[1] created between a firm and the public by past business intercourse constitute a distinct asset of calculable value.[2] This connection, depending largely for its permanence upon the associative quality of a familiar firm name, trademark or characteristic method of business, and liable consequently to injury from the fraudulent use

[1]Rowell *v.* Rowell (1904) 122 Wis. 1.

[2]Bell *v.* Ellis (1867) 33 Cal. 620; Tennant *v.* Dunlop (1899) 97 Va. 234; Williams *v.* Wilson (N. Y. 1846) 4 Sandf. Ch. 379; Matter of Silkman (N. Y. 1907) 121 App. Div. 202; People *ex rel.* A. J. Johnson Co. *v.* Roberts (1899) 159 N. Y. 70; *In re* Randall's estate (1889) 8 N. Y. Supp. 653; Smith *v.* Everitt (1859) 27 Beav. 446; and see 8 COLUMBIA LAW REVIEW 56.

by others of a similar name, device or method, is protected as a right *in rem* against such violation. Acts of this nature, impairing by physical means a purely psychological relation, have come to be classed under the generic term, unfair competition. In effecting the sale of a goodwill, the vendor transfers without reservation all the benefits of this favorable relation involving necessarily the right to sustain it by the use of the old firm name[3] and trademarks,[4] and the concomitant right to protect it against the whole world, including the vendor himself, by enjoining acts of unfair competition.[5]

Obviously, if the vendee succeeds merely to the rights possessed by his grantor, the latter may, subject only to the general prohibition against acts of unfair competition, compete with him in the same line of business, and such is the law in many jurisdictions.[6] Since, however, by reason of his former connection with the business, the grantor occupies an unusual point of vantage in the competition, many courts have very properly recognized in the purchaser certain rights peculiarly enforceable against the vendor alone, and, invoking the doctrine that a grantor may not derogate from his grant, have restrained acts on his part directly tending to injure the goodwill sold, notably the solicitation of customers of the old business.[7]

The right thus recognized to limit the vendor's freedom in competition has been loosely considered a part of the goodwill itself, the nature and extent of which are said to vary according to the intention of the parties and the character of the transaction in question.[8] Its true nature is, however, clearly revealed by an analysis of the effect of a sale of the goodwill by an officer of the court pursuant to an execution or decree in bankruptcy proceedings. Here, it is well settled, the vendee acquires the same property rights as would pass in a voluntary sale by the proprietor himself. Accordingly, he may use the firm name and trademarks and may prevent their use by the

[3]Slater *v.* Slater (1903) 175 N. Y. 143; Levy *v.* Walker (1878) L. R. 10 Ch. Div. 436; Adams *v.* Adams (N. Y. 1879) 7 Abb. N. C. 292; and see Vonderbank *v.* Schmitt (La. 1892) 15 L. R. A. 462 and note.

[4]Merry *v.* Hoops (1888) 111 N. Y. 415.

[5]Churton *v.* Douglas (N. Y. 1859) Johns Ch. 174; Brass and Iron Works *v.* Payne (Ohio 1893) 19 L. R. A. 82; Fish Bros. Wagon Co. *v.* Fish (Wis. 1892) 16 L. R. A. 453; Myers *v* Kalamazoo Buggy Co. (1884) 54 Mich. 215; Smith *v.* Cooper (N. Y. 1877) 5 Abb. N. C. 274.

[6]Smith *v.* Gibbs (1862) 44 N. H. 335; Cottrell *v.* Babcock Printing Press Co. (1886) 54 Conn. 122; Williams *v.* Farrand (1891) 88 Mich. 473.

[7]Trego *v.* Hunt L. R. [1896] A. C. 7; Labouchere *v.* Dawson (1871) L. R. 13 Eq. 322; Leggett *v.* Barrett (1880) L. R. 15 Ch. Div. 306; Zanturjian *v.* Boornazian (1903) 25 R. I. 151; Curl Bros. *v.* Webster L. R. [1904] 1 Ch. 685; Burckhardt *v.* Burckhardt (1880) 36 Ohio St. 261. The courts, however, have generally hesitated to restrain the vendor from re-engaging in business, probably because of the hostile attitude of the common law towards contracts in restraint of trade. Burdick, Partnership 381; White *v.* Jones (N. Y. 1863) 1 Rob. 321. In Massachusetts, however, if the nature of the business is such that by competing the vendor will "derogate from his grant," he will be enjoined from re-engaging in a similar business. Old Corner Book Store *v.* Upham (1907) 194 Mass. 101; Gordon *v.* Knott (1908) 199 Mass. 173; Munsey *v.* Butterfield (1882) 133 Mass. 492; Dwight *v.* Hamilton (1873) 113 Mass. 175.

[8]Story, Partnership § 99; Collyer, Partnership § 161; Lobeck *v.* Lee—Clarke—Andereesen Hardware Co. (Neb. 1893) 23 L. R. A. 195.

former owner.[9] On the other hand, the latter cannot be restrained from soliciting the old customers. The courts reaching this result assign as a reason therefor that the defendant was not a party to the sale.[10] It would seem to follow, therefore, that strictly speaking, there can be no diversities, by reason of the intention of the parties or the nature of the alienation, in the legal elements which, as rights *in rem*, constitute the goodwill itself and that the additional right to prevent solicitation is, when recognized, purely contractual, arising in the form of an implied covenant from the direct dealing of the parties.[11]

The question then arises under what circumstances such restrictive covenants will be implied. In England the presumption is clearly against the former owner. Indeed, the doctrine as recently developed seems to have the force of a positive rule of law that such a covenant will be implied whenever the relation of vendor and purchaser exists. This rule has been consistently applied not only where the vendor has implied or express authority to re-engage in business,[12] but even where the sale is made involuntarily in obedience to a judicial decree.[13] In Massachusetts the courts have taken a more reasonable view, holding in effect that the inference of an implied covenant is one of fact and that although the presumption is in favor of the vendee, it may be rebutted by proof of circumstances unequivocally evincing a contrary intention. Thus, in compulsory alienations such as sales forced upon the surviving members of a firm by the representatives of a deceased partner, it has been held, and it seems properly, that no covenant should be implied.[14]

In a recent case, *Von Bremen* v. *Macmonnies* (1910) 122 N. Y. Supp. 1087, the court, while recognizing the rule prohibiting solicitation, held that a sale of the assets and goodwill of a business, effected by two partners to a co-partner two months before the time for dissolution fixed in the articles of partnership and for the purpose of avoiding such proceedings was, like the sale of a bankrupt concern, involuntary, and therefore did not bind the vendors to refrain from soliciting their former customers. The court relied upon the doctrine that the nature of the goodwill sold varies according to the circumstances of the case. It seems difficult, however, to support the decision even upon the theory of an implied covenant for, conceding the advisability of modifying the Massachusetts as well as the English rule, it does not appear that the presumption necessarily arising in favor of the vendee from the nature of the transaction was rebutted by proof

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[9]Hegeman & Co. *v.* Hegeman (N. Y. 1880) 8 Daly 1; Hudson *v.* Osborne (1870) 39 L. J. Ch. N. S. 79; Snyder Mfg. Co. *v.* Snyder (Ohio 1896) 31 L. R. A. 657.

[10]Walker *v.* Mottram (1881) L. R. 19 Ch. Div. 355; Griffith *v.* Kirley (1905) 189 Mass. 522; Dawson *v.* Beeson (1882) L. R. 22 Ch. Div. 504.

[11]Jennings *v.* Jennings L. R. [1898] 1 Ch. 378; Smith *v.* Gibbs *supra;* Labouchere *v.* Dawson *supra;* and see Knoedler *v.* Glaenzer (1893) 55 Fed. 895.

[12]Leggett *v.* Barrett (1880) L. R. 15 Ch. Div. 306; Gillingham *v.* Beddow, L. R. [1900] 2 Ch. 242.

[13]*In re* David & Matthews L. R. [1899] 1 Ch. 378; Jennings *v.* Jennings *supra.*

[14]Hutchinson *v.* Nay (1904) 187 Mass. 262.

of the actual intention of both parties to make a different contract. Nor do the circumstances of the case seem sufficiently unequivocal to warrant a judicial inference of such intention.

INTERFERENCE BY COMBINATIONS OF LABOR WITH EMPLOYER'S BUSINESS.—In view of the liberal attitude manifested in certain decisions of the New York Courts with respect to interference by combination with the conventional rights of the individual to pursue his own business unmolested,[1] it is pertinent to ascertain to what extent a combination of labor may interfere with the rights of an employer to deal with whom he chooses and to employ whomsoever he will. It would seem that properly such elementary rights should be legally affected by competition only or by rights of a similarly elementary character.[2] Of this nature is the right of the individual to arbitrarily refrain from working. Logically the same right appertains to the combination of individuals[3] and constitutes its most powerful weapon, the strike, which has found justification, together with peaceful picketing and even boycotting, where there has been direct conflict with the employer.[4] Regarding the right to work as property of the employee and so a commodity, and the employers as occupying the position of consumers, labor organization would seem to be justified on competitive principles, provided always that there is no restraint exerted by reason of the comprehensive nature of the combination.[5] Where the tendency towards such restraint exists, there would seem to present itself a point properly limiting the extent to which combination may go in the pursuit of its own interests,[6] for the courts are jealous of the rights of the public which are here involved, regarding suspiciously all concerted action having even the contingent effect of raising prices.[7] This has been the position with respect to association in restraint of trade.[8] Moreover, by analogy to the judicial condemnation of comprehensive association by employers with the purpose of refusing employment to members of a particular union,[9] it would seem that a similar condemnation should attach to prohibitive combination

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[1]Park & Sons Co. *v.* Nat. Druggist's Ass'n. (1903) 175 N. Y. 1; Nat. Prot. Ass'n *v.* Cumming (1902) 170 N. Y. 315; Jacobs *v.* Cohen (N. Y. 1904) 99 App. Div. 481; Rosenau *v.* Empire Circuit Co. (N. Y. 1909) 131 App. Div. 429.

[2]Curran *v.* Galen (1897) 152 N. Y. 33. See 6 Pomeroy, Equity Jurisprudence § 585.

[3]Mills *v.* U. S. Printing Co. (N. Y. 1904) 99 App. Div. 605; Nat. Prot. Ass'n *v.* Cumming (N Y 1900) 53 App. Div. 227; *cf.* Jersey City Printing Co. *v.* Cassidy (1902) 63 N. J. Eq. 759.

[4]Mills *v.* U S. Printing Co. *supra; cf.* Hertzog *v.* Fitzgerald (N. Y. 1902) 74 App. Div. 110; Butterick Pub. Co. *v.* Typographical Union (N. Y. 1906) 50 Misc. 1; Pickett *v.* Walsh (1906) 192 Mass. 572.

[5]See Davis *v.* United Engineers (N. Y. 1898) 28 App. Div. 396; Wunch *v.* Shankland (N. Y. 1901) 59 App. Div. 482; Erdman *v.* Mitchell (1903) 207 Pa. St. 79

[6]See Jacobs *v.* Cohen *supra.*

[7]See Park & Sons Co. *v.* Nat. Druggist's Ass'n. *supra.*

[8]People *v.* Milk Exchange (1895) 145 N. Y. 267.

[9]McCord *v.* Thompson-Starrett Co. (N. Y. 1908) 129 App. Div. 130.